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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: NOV 0 1 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a software and IT development business. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements. Specifically, the director determined that the beneficiary did not possess a master's degree in computer science, information technology, or a related field or a foreign equivalent degree.

The AAO finds that the individual who filed the appeal is not an affected party as defined at 8 C.F.R. § 103.3(a)(1)(iii)(B). On September 20, 2011, the AAO sent [redacted], the individual who signed the December 5, 2008 Form I-290B, Notice of Appeal or Motion, a fax asking that individual to submit a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, which [redacted] and the petitioner had properly executed. In response, counsel for the petitioner, [redacted] submitted a Form G-28, which that individual and the petitioner had signed. [redacted] explained that [redacted] is an associate who had signed the Form G-28 on Dehai Tao's behalf.

The AAO notes that the instructions for Part 4 of the Form I-290B state that a petitioner or its legal representative must sign the Form I-290B. If the legal representative signed the Form I-290B, then a Form G-28 must be attached. Even though the AAO gave [redacted] an opportunity to submit a properly executed Form G-28 on September 20, 2011 and to correct this noted deficiency within the record of proceeding, only [redacted] submitted a Form G-28 in response. [redacted] is not the petitioner's legal representative in this matter. Thus, an affected party or that party's representative did not file the appeal. Accordingly, the AAO must reject the appeal as improperly filed. 8 C.F.R. § 103.3(a)(2)(v).

Even if the AAO did not reject the appeal, the petition is not approvable for the reasons discussed below. On appeal, counsel submits a brief, three evaluations and an affidavit regarding the beneficiary's educational equivalency, letters regarding the beneficiary's prior work experience, and additional evidence.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a foreign three-year Bachelor of Science degree diploma completed in 2000 from [redacted] in India and a foreign two-year Master of Science degree diploma in information technology completed in 2002 from [redacted] in India. Thus, the issues are whether this degree qualifies the beneficiary for the classification sought and meets the specified job requirements.

Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg'l Comm'r 1977). Federal courts have recognized this division of authority. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A U.S. baccalaureate degree generally requires four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second

preference immigrant visas. The AAO must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a "4-year course of undergraduate study." S. Rep. No. 101-55 at 20 (1989). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a U.S. baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign

[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

equivalent degree" to a U.S. baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a U.S. baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Counsel submitted evaluations from [redacted] dated December 14, 2006, [redacted] dated July 16, 2007, and [redacted] dated August 26, 2008 and December 3, 2008 respectively as well as an affidavit from [redacted] dated February 19, 2007.

[redacted] states that U.S. master's degree programs require only between one and one and a half years of full-time coursework for a total of 30 to 45 credits. [redacted] concludes that the beneficiary completed the equivalent to a Bachelor of Science degree and a Master of Science degree in information technology. He states that both universities that the beneficiary attended were accredited. [redacted] asserts that the beneficiary's undergraduate program required the completion of high school and competitive entrance exams and that the beneficiary's graduate program required the completion of bachelor's level studies and competitive entrance exams. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). [redacted] asserts that the first year of the beneficiary's master's program was the equivalent to the last year of a U.S. bachelor's degree and that the second year was the equivalent to a U.S. master's degree. He states that he bases his analysis on the credibility of both universities, the number of years of coursework, and the nature of the coursework.

[redacted] first states that many students from India currently enrolled in graduate degree programs in the United States possess three-year bachelor's degrees and that they are usually able to finish master's degree programs within one and a half to two years. He notes that these students may need

to take additional calculus or physics classes to address a deficiency. Specifically, [redacted] stated in August 2008 that some students within his program that possess three-year bachelor's degrees must take extra courses in order to complete their master's degrees. However, in December 2008, [redacted] stated that Indian three-year bachelor's degrees are equivalent to U.S. bachelor's degrees. These statements are inconsistent. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

[redacted] later concludes that the beneficiary completed the equivalent to a Bachelor of Science degree and a Master of Science degree in the United States. Unlike [redacted] does not specify the fields of study for the beneficiary's equivalent degrees. Similar to [redacted] asserts that the beneficiary's master's degree program required the completion of bachelor's level studies and competitive entrance exams.

In [redacted] affidavit, he finds that the beneficiary's three-year bachelor's degree is not directly equivalent to a U.S. bachelor's degree on its own, but rather that the beneficiary's master's degree elevates its equivalency in the United States. [redacted] states that [redacted] "often" admits students with three-year bachelor's degrees into its master's degree programs without additional study. If a three-year Indian bachelor's degree is truly equivalent to a four-year bachelor's degree in the United States, it would follow that [redacted] and other U.S. universities would admit all students with three-year Indian bachelor's degrees into their master's degree programs without requiring additional coursework. The AAO notes that [redacted] and [redacted] fail to provide the specific educational equivalency of the beneficiary's degrees in the United States.

The AAO notes that all four evaluators have not provided any peer reviewed source to support their opinions. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

Moreover, the AAO has consulted the Electronic Database for Global Education (EDGE) as a tool to help analyze the beneficiary's educational background. According to its website, the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which created EDGE is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx (accessed August 19, 2011 and incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher

education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. [redacted] "AACRAO EDGE Login," http://aacraoedge.aacrao.org/ (accessed August 19, 2011 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "master's" degree were comparable to a U.S. bachelor's degree. In [redacted], 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the alien employment certification itself required a degree and did not allow for the combination of education and experience.

In the section related to the Indian educational system, EDGE provides that a Bachelor of Science degree is three years in duration and represents attainment of a level of education comparable to only two to three years of university study in the United States. EDGE also provides that a Master of Science degree is two years in duration and represents attainment of a level of education comparable to a bachelor's degree in the United States. The information listed within EDGE is inconsistent with [redacted] and [redacted] evaluations.

Based on the juried opinion in EDGE, the AAO must conclude that the beneficiary's Bachelor of Science degree and Master of Science degree in information technology in this matter are only equivalent to a bachelor's degree from a regionally accredited institution in the United States.

On appeal, counsel asserts that certain U.S. universities allow individuals with three-year bachelor's degrees to enter into their master's degree programs. The AAO finds that the fact that certain U.S. universities may allow three-year bachelor's degrees for entrance not to be persuasive. Some of these universities may pose additional requirements as [redacted] noted in his August 2008 evaluation. In the alternative, counsel asserts that the beneficiary possesses the equivalent to a U.S. bachelor's degree followed by five years of progressive experience in the specialty.

Counsel submitted a prior AAO decision to bolster the petitioner's argument that the beneficiary possesses the equivalent to a master's degree. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

As the beneficiary earned a foreign equivalent degree to a U.S. baccalaureate, the AAO has reviewed the record to determine whether the petitioner has documented that the beneficiary has the necessary five years of post-baccalaureate experience. On the Form ETA 9089, the beneficiary listed employment as a program analyst for Impact Informatics from April 2002 to March 2005. However, the beneficiary filed a Form G-325A in conjunction with his Form I-485 adjustment application on July 26, 2007 listing his employment for that entity as a project manager. The work experience letter that the petitioner submitted from Impact Informatics also stated that the beneficiary worked as a project manager for that employer. The petitioner has failed to explain this inconsistency, which affects the credibility of the information the petitioner submitted regarding approximately three years of the beneficiary's post-baccalaureate progressive work experience in the specialty or the proffered position of system analyst. *Matter of Ho*, 19 I&N Dec at 591-592. The AAO notes that DOL's Occupational Outlook Handbook (OOH) states that project managers perform functions such as developing budgets and schedules, whereas program analysts' duties are more limited to applications and to software design and development.[2]

Based on the above credibility issues, the petitioner did not demonstrate that the beneficiary possessed more than five years of progressive, post-baccalaureate work experience in the specialty before the priority date of May 3, 2007. Thus, the beneficiary did not possess the requisite experience to qualify as an advanced degree professional under section 203(b)(2) of the Act as of the priority date.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able,

[2] The OOH, located at http://www.bls.gov/oco, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

> willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, lines 4 and 7, of the alien employment certification reflects that a master's degree in computer science, information technology, or a related field is the minimum level of education required. Line 6 reflects that no experience is required. Line 9 reflects that a foreign educational equivalent is acceptable. However, Line 8 reflects that no alternate combination of education and experience is acceptable.

The beneficiary earned a foreign three-year Bachelor of Science degree diploma completed in 2000 from [redacted] in India and a foreign two-year Master of Science degree diploma in information technology completed in 2002 from [redacted] in India. For the reasons stated above, the beneficiary's education is a foreign equivalent degree to a U.S. baccalaureate. Even if there were no credibility issues with the beneficiary's claimed experience, that experience cannot meet the educational requirements on the alien employment certification. While a bachelor's degree followed by five years of progressive experience in the specialty may be "equivalent" to a master's degree under 8 C.F.R. § 204.5(k)(2) for purposes of qualifying for the classification sought,

it is not the same as a master's degree for purposes of meeting the job requirements DOL certified. "Equivalency" means something different than "sameness." *See Snapnames.com, Inc. v. Chertoff,* 2006 WL 3491005 at *8 (D. Or. Nov. 30, 2006). Given the petitioner's express statement on Line 8 that it would not accept any combination of education and experience in lieu of a U.S. master's degree or foreign equivalent degree, the beneficiary cannot meet the job requirements with anything other than a U.S. master's degree or foreign equivalent degree.

The beneficiary does not have the master's degree in computer science, information technology, or a related field or its foreign equivalent required for the job as specified on the alien employment certification. The beneficiary thus does not meet the job requirements on the alien employment certification. For this reason, the petition may not be approved.

If the AAO were not rejecting the appeal, then the AAO would have instead issued a Notice of Intent to Dismiss (NOID) to the petitioner based upon the above noted EDGE materials. Such notice, though, would serve no purpose in this instance because an affected party did not file the appeal.

The petitioner, nor any entity with legal standing in the proceeding, filed the appeal. Rather, an associate of counsel's firm filed the appeal without a properly executed Form G-28. This attorney was offered an opportunity to correct this deficiency by filing a properly executed Form G-28 but declined to do so. Therefore, the appeal has not been properly filed and must be rejected.

ORDER: The appeal is rejected.